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In the Supreme Court of the United States

OCTOBER TERM, 1996

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Pursuant to Rule 25.5 of the Rules of this Court, the Solicitor General respectfully files this supplemental brief to bring to the Court's attention certain provisions of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, which was approved by the President on September 30, 1996. Division C of that law consists of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) (reproduced at 142 Cong. Rec. H11,787 (daily ed. Sept. 28, 1996)). As we explain below, those provisions do not affect the merits of this case or the Court's jurisdiction to entertain it.

The question presented in this case is whether the Attorney General, when deciding whether to grant a

discretionary waiver of deportation under Section 241(a)(1)(H) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(H),[1] may take into account acts of fraud that the alien committed before and after his fraudulent entry into the United States. The Board of Immigration Appeals (Board) held that the immigration judge, while disregarding respondent's fraud at entry, had properly considered, as adverse factors relevant to the discretionary determination of whether to grant a waiver, respondent's other acts of fraud committed before and after that unlawful entry. Pet. App. 9a-11a. Respondent sought judicial review under Section 106 of the INA, 8 U.S.C. 1105a, and the court of appeals vacated the Board's decision and remanded the case for further proceedings. The court held that the Board erred in considering respondent's various frauds because the court viewed those acts as part of, or extensions of, respondent's fraud at entry. Pet. App. 2a-3a.

Section 306(b) of the IIRA repeals Section 106 of the INA, 8 U.S.C. 1105a, the provision under which respondent obtained judicial review in this case. Section 306(a) of the IIRA enacts a new Section 242 of the INA (8 U.S.C. 1252) to govern judicial review in the future. The new 8 U.S.C. 1252 contains a provision that specifically precludes judicial review of decisions or actions the authority for which is committed, under the INA, to the discretion of the

[1] Section 305(a) of the IIRA redesignated Section 241 of the INA, 8 U.S.C. 1251, as Section 237 of the INA, 8 U.S.C. 1247. That redesignation, along with most amendments made by Title III-A of the IIRA, will take effect the first day of the first month beginning more than 180 days after enactment, or on April 1, 1997. See IIRA § 309(a); pages 5-6, *infra*.

Attorney General. As amended, Section 242(a)(2)(B), 8 U.S.C. 1252(a)(2)(B), provides:

> DENIALS OF DISCRETIONARY RELIEF.—Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 212(h), 212(i),[2] 240A, 240B, or 245, or
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [asylum for refugees].

Paragraph (ii) will remove from the federal courts any jurisdiction to review decisions of the Attorney General that, like the decision on review in the instant case, deny an alien a discretionary waiver of deportation under what is now Section 241(a)(1)(H) of

[2] This preclusion of review under Section 212(i) of the INA is repeated in Section 212(i) itself, as amended by the IIRA. Section 349 of the IIRA amends Section 212(i) of the INA, 8 U.S.C. 1182(i), which provides for a parallel discretionary waiver of exclusion based on fraud. See Gov't Br. 23-27. Section 212(i)(2), as amended, specifies that "[n]o court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver" of exclusion based on fraud. That special preclusion of review (which is not contained in Title III-A of the IIRA) appears to be effective immediately.

the INA, 8 U.S.C. 1251(a)(1)(H).[3]

Subsection (c) of Section 306 of the IIRA sets forth the effective dates for the amendments to the judicial review provisions of the INA that were made by subsections (a) and (b) of Section 306. Section 306(c)(1) states that, in general,

> the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and subsection (g) of section 242 of the [INA] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Under this provision, as it now stands, in cases in which the Board decision denying a waiver or other discretionary relief and ordering deportation (removal) is filed on or after September 30, 1996, former Section 106 of the INA will not afford an avenue for judicial review and no court will have jurisdiction to review the Board's grant or denial of discretionary relief. Section 306 of the IIRA does not affect, however, judicial review of Board decisions denying discretionary waivers of deportation, such as the

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[3] The new Section 242(g) of the INA (8 U.S.C. 1252(g)) reinforces that conclusion. It provides:

> EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

decision in the instant case, that were entered and subject to judicial review prior to September 30, 1996.[4]

On October 4, 1996, Congress passed a bill (S. 2197) that includes a "Technical Correction" to Section 306(c)(1) of the IIRA. That correction would amend Section 306(c)(1) to state that, in general:

> the amendments made by subsections (a) and (b) shall apply *as provided under Section 309*, except that subsection (g) of section 242 of the [INA] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

See 142 Cong. Rec. H12,294 (daily ed. Oct. 4, 1996) (emphasis added). If this provision is approved by the President, then under Section 309(a) of the IIRA, the effective date for Sections 306(a) and (b) (like the rest of Subtitle III-A of the IIRA) will be "the first day of the first month beginning more than 180 days after the date of the enactment" of the IIRA ("the title III-A effective date").

Section 309(c)(1) of the IIRA further provides that (subject to certain special transitional rules for judicial review in Section 309(c)(4)), "in the case of an alien who is in exclusion or deportation proceedings as of [or before] the title III-A effective date," the

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[4] Section 306(c)(2) of the IIRA also specifies that Section 306(c)(1) "shall not be considered to invalidate or to require the reconsideration of any judgment or order entered under section 106 of the Immigration and Nationality Act, as amended by section 440 of Public Law 104-132." By virtue of this provision as well, the judgment of the Ninth Circuit in this case is not affected by the IIRA, and this Court has jurisdiction to review that judgment.

amendments made by title III-A shall not apply and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments"—*i.e.*, under prior law.[5]

Thus, if the President approves the bill containing the technical correction of the effective date in Section 306(c)(1) of the IIRA, the preclusion of review in the new 8 U.S.C. 1252(a)(2)(B) of decisions of the Attorney General under Section 241(a)(1)(H) of the INA will not apply in any case in which the administrative exclusion or deportation proceedings were instituted prior to April 1, 1997. But *cf.* IIRA § 309(c)(4)(E) (precluding judicial review of certain other discretionary determinations during transition period). As a result, decisions in deportation cases that enter the administrative pipeline over the next six months in which the alien seeks a waiver of deportation under Section 241(a)(1)(H) of the INA will continue to be subject to judicial review under the conflicting circuit precedents that we cite in our certiorari petition and briefs on the merits, and judicial review in any such cases in the Ninth Circuit will be governed by that court's decision in the instant case. For that reason, and because this case has been fully briefed and set for oral argument, we believe the Court should resolve the important question presented. The plainly erroneous decision below, which announces unwarranted limitations on the Attorney General's exercise of her discretion

[5] Even in the absence of the technical corrections amendment, there may be some question whether (or to what extent) the effective date provisions in Section 309 would apply to the judicial review provisions enacted in Section 306 in any event. Compare IIRA § 309(a) with IIRA § 309(c)(1) and (4).

under the INA, should not be permitted to cast a shadow over the administration of the INA into the future.[6]

Respectfully submitted.

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[6] On September 19, 1996, respondent filed a motion with the Board to reopen his case to apply for adjustment of status. We have been informed that respondent's motion was returned for a technical defect in the fee payment. Respondent submitted a copy of the motion to this Court. The INS filed an opposition to that motion on October 2, 1996, and we are lodging a copy of that filing with the Court along with the filing of this brief. Respondent seeks relief under Section 212(i) of the INA in connection with his request for adjustment of status. Although the IIRA amends Section 212(i) (see note 2, *supra*), it does not appear at this time that the amendment would affect the merits of respondent's application. Respondent's motion to the Board for reopening has no bearing on the issues before this Court.